



Comptroller General
of the United States
Washington, D.C. 20548

Burkard H. Stoltz

Decision

Matter of: American Diesel Engineering Co., Inc.

File: B-245534

Date: January 16, 1992

John R. Bagileo, Esq., Klein & Bagileo, for the protester.
A. L. Haizlip, Esq., United States Coast Guard, for the agency.

Richard P. Burkard, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against agency's failure to provide potential offerors with access to technical data necessary to submit a competitive proposal as an undue restriction on competition is denied where the agency has reasonably concluded that it does not own the necessary rights in the data which would allow the agency to provide offerors with access thereto.

DECISION

American Diesel Engineering Co., Inc. protests under request for proposals (RFP) No. DTCG80-91-R-3FAB83, issued by the Coast Guard for the disassembly, inspection, reassembly, and testing of Paxman Valenta 16RP200M Marine Propulsion engines. American argues that the Coast Guard has violated the requirement for full and open competition by failing to make available Paxman data which are essential for the preparation of offers.

We deny the protest.

The RFP, which was issued on May 31, 1991, contemplated a fixed-price indefinite quantity contract with a base and four option periods. The RFP specified over 60 "work items" to be performed on the engines for each of the contract periods. The standard repair specification, attached to the RFP, set forth the requirements for each work item and stated that for each the Paxman Valenta (RP200) Diesel Engine Operating & Maintenance Instructions and Paxman Valenta (RP200) Diesel Engine Illustrated Parts List were "applicable documents." The RFP work items required that the tasks be performed in accordance with specific provisions of the Paxman manuals, which the solicitation listed as "Government Documents." The RFP also required

that the contractor perform all work at a certified Paxman repair facility with a minimum of one certified Paxman Service Technician.

On July 11, the Coast Guard held a preproposal conference concerning this RFP. At the conference, in response to a written question about the data, the contracting officer acknowledged that the documents were essential to the preparation of offers, but advised the potential offerors at the preproposal conference that he was unsure what the government's rights were in the data but he was seeking clarification of the issue. The contracting officer did state, however, that it was his understanding that the data was commercially available.

By amendment No. 4 to the RFP, dated August 13, the agency revised the standard repair specification by deleting the Paxman data from the list of "Government Documents." Instead, the specification listed the Paxman data as "Required Manufacturers Technical Publications." By letter of the same date, the contracting officer advised potential offerors that the technical data would not be provided by the government and that "offerors shall obtain the necessary technical data, including the technical manuals, on their own." In addition, the RFP amendment deleted the requirement that the work be performed at a Paxman facility. The specification continued to require a minimum of one certified Paxman Service Technician. Amendment No. 4 extended the closing date for receipt of proposals to September 19. On September 5, American filed this protest.

American objects to the Coast Guard's failure to make the Paxman documents available. It argues that the Paxman data are essential for the preparation of an offer under the RFP and that they are not available commercially. The protester also contends that the Coast Guard possesses rights in the documents and is not prohibited by law from providing offerors with copies of them.

The Coast Guard has not disputed that the documents are essential for preparation of offers. Indeed, the RFP, as amended, lists the manuals as "Required Manufacturer's Technical Publications," and references them for each work item. The agency has concluded, however, that it cannot make the data that it possesses available to the firms under the RFP because it has only limited rights in the data, and those rights do not include the right to make them available to potential competitors of Paxman in connection with a procurement such as this. In this regard, the agency says that it understands that the data is commercially available

and points to the fact that it has received offers under the RFP, at least one of which is, according to the agency, from an "independent" firm.¹

The protester contends that the agency's failure to provide the Paxman manuals to potential offerors violates the Competition in Contracting Act of 1984 (CICA), which generally requires agencies to obtain full and open competition through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A) (1988). CICA requires that solicitations specify an agency's needs and solicit offers in a manner designed to achieve full and open competition, 10 U.S.C. § 2305(a)(1)(A), and may include restrictive provisions only to the extent necessary, 10 U.S.C. § 2305(a)(1)(B)(ii); Corbin Superior Composites, Inc., B-242394, Apr. 19, 1991, 91-1 CPD ¶ 389.

The RFP, as originally issued, implied that the data was available from the government for the use of all potential offerors. As a result of amendment No. 4, the field of competition was limited to those offerors which have access to the data from other than the government because it is virtually impossible to prepare an offer or perform the contract without the specified Paxman data. Neither the agency nor the protester disagree that competition would be enhanced if the agency could make the data available; they disagree as to its availability.

According to the Coast Guard, the Paxman manuals, or at least some of the data from which they are composed, first came into its possession pursuant to contract No. DTCG23-84-C-31063, which the agency entered into in 1983 with Bollinger Machine Shop & Shipyard, Inc. for 110 Foot Island Class Patrol Boats.² The contract contains an extensive delivery schedule which includes numerous data items, including various manuals and technical drawings. As originally executed, the contract contained a clause entitled "Rights in Technical Data and Computer Software (1981)" which appears to have granted the Coast Guard unlimited rights in installation, operation, training or maintenance manuals to be delivered under the contract. However, the parties subsequently entered into Modification No. C002 to the contract which states that the "... contract is hereby modified as follows:

¹The Coast Guard reports that it has not opened or reviewed the proposals it has received.

²Paxman was the original engine supplier for the boats.

Reference Section H, SPECIAL PROVISIONS, H-1(b)(2)
- Rights in Technical Data and Computer Software
(1981 May) - The government shall have limited
rights in the data listed on pages 2 through 22 of
this modification."

The modification contains an extensive list of data items
which after the execution of the modification were to be
delivered with only limited rights.³

The Coast Guard states that it now believes that under the
Bollinger contract as modified, it does not have sufficient
rights in the Paxman data--which the agency says contain a
restrictive legend--to make it available under the RFP. On
the other hand, the protester has reviewed the Bollinger
contract and its modification and comes to the conclusion
that the Coast Guard indeed has unlimited rights in the
data.

We consider protests against the disclosure of a firm's
allegedly proprietary data in order to provide some
protection against the unauthorized disclosure in a
solicitation and to prevent government liability for damages
for the disclosure. Hex Indus., Inc., Avel Corp., and
Cosmodyne, Inc., B-243867, Aug. 30, 1991, 91-2 CPD ¶ 223.
This is not such a case. Here, the protester argues that
the agency does have rights to the data and that it is
obliged to disclose the data in order to obtain full and
open competition. Under these circumstances, we will review
the agency's position to ensure that it has a reasonable
basis for not disclosing the data and thereby restricting
competition.

We have carefully reviewed the record including the con-
tract, its modification, and the parties' submissions, and
it is not at all clear what rights the Coast Guard has to
the Paxman data. We are unable to identify the line item or
items in the original contract delivery schedule which
represent the data at issue, nor can we locate it in the
list attached to the modification. Neither the Coast Guard
nor the protester have identified the relevant data in the
contract or modification. In view of this uncertainty as to
the rights in the data and considering the fact that the
agency could be subject to liability if it were to make the
Paxman manuals available to potential competitors under the

³"Limited rights" in this case means that the manuals can
only be used by parties other than the government for
emergency repair or overhaul work. See Federal Acquisition
Regulation § 27.404(d).

RFP, we conclude that the agency had a reasonable basis for refusing to release the data.

Since the agency reasonably concluded that it cannot provide potential offerors with access to the data, we do not believe the failure to provide the data to potential offerors constitutes a violation of CICA as an undue restriction on competition. Although performance of the contract requires access to the data, which virtually defines the scope of the work to be performed under the contract, as long as the requirement is reasonably related to the procuring agency's minimum needs, the fact that there is only limited competition, or even only one source, does not necessarily render it unduly restrictive. Barrier-Wear, B-240563, Nov. 23, 1990, 90-2 CPD ¶ 421.

The protest is denied.


James F. Hinchman
General Counsel